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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Glenn)

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KVB, INC.,

Plaintiff and Appellant,

v.

COUNTY OF GLENN,

Defendant and Respondent.

C084188

(Super. Ct. No. 16CV01593)

Plaintiff KVB, Inc. (KVB) and defendant County of Glenn (County) entered into a memorandum of understanding (MOU) under which the parties agreed to work toward development and completion of a new wastewater facility. A key objective of the project was to reduce costs for County residents; this was to be achieved in part by designing a project that would accept an out-of-county waste stream. Another feature of the project emphasized by KVB was that the facility would be located on land controlled by KVB.

The County selected an outside environmental consulting firm to prepare an environmental impact report (EIR) and KVB was obliged to pay for this review. (See

California Environmental Quality Act (CEQA), Pub. Resources Code, § 21000 et seq.).<sup>1</sup> The EIR was circulated for public comment and approved by the County's Planning Commission. An appeal was taken to the County's Board of Supervisors (Board). After a hearing at which comments for and against the project were heard, the Board declined to certify the EIR and then adopted a resolution ordering recirculation of the EIR with new parameters, including studying an alternative project site and elimination of the out-of-county waste stream.

KVB neither paid to recirculate the EIR, nor filed a mandamus petition to overturn the recirculation resolution. Instead, KVB filed this civil lawsuit seeking damages for breach of contract (and related theories). The County demurred, arguing KVB's failure to overturn the resolution via mandamus meant it was barred from suing under the doctrine of judicial exhaustion. Alternatively, the County argued KVB had not stated any good cause of action. The trial court sustained the demurrer without leave to amend, and KVB timely appealed from the ensuing judgment.

Although in the form of a breach of contract suit, the complaint questions the soundness of the Board's determination that further environmental review (via a recirculated EIR) was warranted. KVB bases its claim for damages on the idea that the Board did not act consistently with CEQA principles, thereby breaching the MOU, an implied covenant of good faith thereunder, or a promise arising from the course of dealing of the parties. But because KVB did not attack the Board's recirculation resolution, it cannot show that the Board's decision was based on improper criteria. By statute, any review of a CEQA determination must be made by mandamus. Accordingly, the trial court properly found KVB's complaint was barred by the failure to attack the resolution.

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<sup>1</sup> Undesignated statutory references are to the Public Resources Code.

KVB did not seek leave to amend in the trial court. However, an appellant may propose amendments for the first time on appeal to show that leave to amend should have been given, and KVB has done so. We shall reverse with directions to allow KVB to amend to pursue mandamus relief, leaving the County free to interpose whatever defenses it then deems proper.

### **BACKGROUND**

Consistent with the applicable standard of review, we recite the facts alleged in the complaint as if they were true.<sup>2</sup>

#### *The Complaint*

By 2007 the County recognized that its landfill was nearing capacity. In 2009 KVB presented the County with the idea of building a “waste-to-energy” facility. This would be a two-phase facility on land owned by KVB, one phase to separate recyclables or otherwise valuable material and one phase to process organic waste into bio-gas fuel. The County entered into an MOU with KVB in 2010.

The MOU was incorporated into KVB’s corrected complaint. It contains a number of recitals, including that the parties “share a common vision” of a “state-of-the-art conversion facility;” that “two central objectives . . . are to reduce the cost of waste collections services provided to Glenn County residents and businesses and to secure waste from areas outside of Glenn County;” the County “understands” that success “depends on the availability, selection and security of an appropriate development site;” and that the County “recognizes” that the project depends “on the existence, support and

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<sup>2</sup> “Because this case arises on demurrer, for purposes of this appeal we must accept as true the allegations in the complaint. We accept the well-pleaded facts alleged in the complaint and matters judicially noticeable, but not rhetoric or conclusions of law. We consider de novo whether the complaint states a viable claim for relief. [Citations.]” (*People ex rel. Brown v. Powerex Corp.* (2007) 153 Cal.App.4th 93, 97; see *Yvanova v. New Century Mortgage Corp.* (2016) 62 Cal.4th 919, 924.)

ultimate success of a project developer,” which the County confirmed was KVB via the request for proposals. Project details were outlined, including that the project would “potentially accommodate” waste from outside the County “after the County’s disposal needs” were met, and that the project be sited on property “controlled by KVB” near Hamilton City. The County agreed to “assist KVB with all necessary environmental reviews/clearances and permitting associated with” the project. General provisions included the duty of each party to “do all things . . . necessary to fulfill and effect the provisions” of the MOU and to protect the rights of each party.

As relevant to this appeal, KVB alleged the two key provisions of the MOU provided: 1) for out-of-county waste (e.g., from Chico) to be collected, which would lower the tipping fee for Glenn County residents, and 2) that the project would be built on KVB’s controlled land. In reliance on these commitments, KVB paid for an environmental study conducted by an experienced firm selected by the County. The ensuing CEQA review proceeded with no indication that the County intended to change project parameters. The County and KVB worked closely together to bring the project to fruition, and KVB spent much money and time pursuing it.

The County’s Planning Commission supported certification of the EIR, but a citizens group appealed to the Board, which held a hearing on March 29, 2016. The Board rejected a proposed resolution to certify the EIR (by a three-to-two vote). The Board discussed the matter--in what KVB claims was an inadequate 15-minute period--and then unanimously adopted a resolution to recirculate the EIR, striking references to Chico waste, expanding the discussion of the existing landfill site (that is, not necessarily using KVB’s land), limiting the daily tonnage of the waste stream to preclude out-of-county waste, and further analyzing and modifying some mitigation measures. KVB alleges these determinations were not based on CEQA principles, and on information and belief claims the denial of certification was “motivated by personal interest or political

concerns” of the three supervisors voting against certification. The complaint describes why, in KVB’s view, the purported CEQA concerns were unwarranted.

The complaint alleges three legal theories that we interpret to support one cause of action for breach of contract, as described in Part I of the Discussion, *post*.

#### *The Demurrer*

The County demurred, alleging judicial exhaustion precluded the complaint. It alternatively alleged defects in each of KVB’s legal theories. It sought and obtained judicial notice of a provision of the County Code regarding challenges to Planning Commission decisions. The point was to show that the Board’s hearing was the type that could trigger a mandamus action.

KVB opposed the demurrer, arguing the failure-to-exhaust defense was “specious” and contesting each of the County’s alternative claims. KVB in part argued it could not have forced the County (via mandamus) to act differently on the CEQA issues, there had been no final CEQA determination, and the County had failed to make required CEQA findings that otherwise would have enabled KVB to challenge the County’s determination, if it *were* deemed final.

KVB sought and obtained judicial notice of various Board documents, including minutes of the hearing in question.

The trial court sustained the demurrer without leave to amend on the ground of failure to exhaust judicial remedies and did not reach the County’s alternative theories. The court reasoned that (1) the Board had a non-delegable duty to determine the adequacy of the EIR, (2) CEQA provides that any action to challenge a CEQA finding must be made via mandamus, and (3) by failing to set the Board’s actions aside, KVB cannot claim that the Board’s actions were in error and therefore cannot sue on the theory that a different CEQA action should have been taken by the County. KVB timely appealed from the ensuing judgment.

## DISCUSSION

### I

#### *Legal Effect of the Complaint*

The complaint purports to allege multiple (albeit related) causes of action. Contrary to KVB's view, its alternative theories of breach of the covenant of good faith and fair dealing and promissory estoppel add little--if anything--to the breach of contract claim. A cause of action exists for interference with a primary right. (See 4 Witkin, Cal. Procedure (5th ed. 2008) Pleading, §§ 34-41.) Different legal theories may be pursued in aid of a single, primary right, but that does not create different causes of action. (See *Slater v. Blackwood* (1975) 15 Cal.3d 791, 795-796; *Uhrich v. State Farm Fire Casualty Co.* (2003) 109 Cal.App.4th 598, 605.)

Because the complaint incorporates the MOU, the MOU's terms control over any contrary allegations of its meaning. (See *Stella v. Asset Management Consultants, Inc.* (2017) 8 Cal.App.5th 181, 190-191.) The two "central objectives" were to reduce the cost of waste collection for local residents and businesses and to secure waste from outside the County; the second objective would help achieve the first. The project would, among other things, be developed on KVB-controlled property, and the parties would try to reduce local tipping fees. The County would "support KVB's efforts to secure waste from areas outside of Glenn County" and "assist KVB with all necessary environmental reviews/clearances and permitting." Both parties agreed to "do all things . . . necessary to fulfill and effect the provisions of this [MOU] and protect the respective rights of the Parties."

The elements of a breach of contract claim are: (1) a contract between the parties, (2) plaintiff's performance (or excuse from performance), (3) defendant's breach, and (4) damages flowing therefrom. (See *Mammoth Lakes Land Acquisition, LLC v. Town of Mammoth Lakes* (2010) 191 Cal.App.4th 435, 463 (*Mammoth Lakes*); 4 Witkin, Cal. Proc., *supra*, Pleading, § 515.) Generally, "Prevention or hindrance of the other party's

performance operates not only as an excuse for the performance [citations], but is also a breach, giving that party the affirmative remedies for breach. [Citations.]” (1 Witkin, Sum. of Cal. Law (11th ed. 2018) Contracts, § 876.)

KVB’s breach of contract claim alleges the County undermined the MOU (and the course of dealings of the parties) by not certifying the EIR and instead passing a resolution requiring the EIR to be recirculated with parameters that, in KVB’s view, were unwarranted by a reasonable application of governing CEQA principles.<sup>3</sup> The recirculated EIR would 1) consider a different location not controlled by KVB; 2) fail to consider the out-of-county waste stream (critical to the project according to KVB); and 3) needlessly study further mitigation measures. KVB alleges the County breached the provision of the MOU requiring the County to support efforts regarding the out-of-county waste stream, and impliedly alleged this breached a provision requiring the County to “assist KVB with all necessary” environmental reviews and permits for the project.

Under the rubric of a separate cause of action for breach of the covenant of good faith and fair dealing, KVB alleges: “Eliminating the possibility of waste from Chico or limiting the potential tons per day of the Project, as the Board majority knew, would destroy the up-side economic potential of the Project as it was originally conceived and proposed. The Board’s . . . Resolutions have unreasonably interfered with KVB’s ability to realize the benefits of the MOU and the proposed Project.”

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<sup>3</sup> Although the complaint also faults the decision not to certify the EIR, KVB equivocates about whether this suit is based on that decision and calls the *recirculation* decision “the real deal killer.” *Schellinger Brothers v. City of Sebastapol* (2009) 179 Cal.App.4th 1245, held mandamus does not lie to compel a lead agency to exercise its discretion as to EIR certification (see *id.* at pp. 1265-1266.) A CEQA statute prevents a court from ordering an agency to take a particular action. (See § 21168.9, subd. (c).) But the fact that KVB *cannot* compel certification of an EIR via mandamus does not necessarily mean it *can* sue the County for breach of contract for failing to certify the EIR.

Where, as here, allegations of breach of the covenant of good faith “do not go beyond the statement of a mere contract breach and, relying on the same alleged acts, simply seek the same damages or other relief already claimed in a companion contract cause of action, they may be disregarded as superfluous as no additional claim is actually stated.” (*Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1395; see *Avidity Partners, LLC v. State of California* (2013) 221 Cal.App.4th 1180, 1203 [claim is “superfluous since it relies on the same alleged acts and seeks the same relief claimed in [the] breach of contract” claim].) Because KVB’s breach of covenant claim restates the contract claim, it is not a separate cause of action.

Nor does KVB’s purported promissory estoppel claim add a cause of action separate from the alleged contract breach. KVB pleads it worked for seven years based on the County’s repeated assurances that it wanted a facility “capable of accepting out-of-county waste,” and KVB reasonably relied on such assurances by spending time and money (e.g., on the EIR). However, “The Board’s March 29, 2016 resolutions directly conflict with the promises and representations the County, its Board and its staff made to KVB over the years. [¶] Because of the County’s breach of those promises, KVB sustained monetary loss.” KVB’s point appears to be an effort to preclude the County from arguing that the MOU had already expired by its own terms; in other words, KVB pleads that the County is estopped to deny that the MOU is still operative.

Contrary to KVB’s evident view, promissory estoppel is not a cause of action. When established, promissory estoppel prevents a party from avoiding a contract by claiming no consideration supports it. (See 1 Witkin, Sum. of Cal. Law, *supra*, Contracts, § 244; *Avidity Partners, LLC v. State of California*, *supra*, 221 Cal.App.4th at p. 1209 [purpose of the doctrine is to make a promise binding absent consideration; “ ‘it is only where the reliance was unbargained for that there is room for application of the doctrine of promissory estoppel’ ”].) In any event, we express no view on the adequacy

of this claim, because in light of our holding we do not address the County's theory that the MOU had expired.<sup>4</sup>

The complaint also alleges the supervisors who voted against the certification resolution acted with improper motives, although it does not fault the unanimous vote for the recirculation resolution. The complaint first alleges that "possibly" due to "conflicts of interest" that are not described, the three supervisors voted against certifying the EIR. Later it states: "On information and belief, the three 'nay' votes . . . were motivated by personal interest or political concerns of these three Supervisors, not by their belief about the County's best interests." These allegations of official impropriety are ineffectual. "A pleading made on information and belief is insufficient if it 'merely assert[s] the facts so alleged without alleging such information that 'lead[s] [the plaintiff] to believe that the allegations are true' ' [Citation.]" (*Gomes v. Countrywide Home Loans, Inc.* (2011) 192 Cal.App.4th 1149, 1158-1159, quoting *Doe v City of Los Angeles* (2007) 42 Cal.4th 531, 551, fn. 5.) The complaint does not explain the basis for KVB's purported beliefs, therefore we disregard these allegations.

Accordingly, carefully read, the complaint alleges a single cause of action for breach of the MOU, which occurred when the County--in derogation of CEQA principles--ordered recirculation of the EIR, in conflict with project objectives.

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<sup>4</sup> On appeal KVB proposes amendments to allege that by failing to cooperate with KVB to ensure a "final" CEQA decision, the County is estopped from claiming the recirculation resolution was final enough to review via mandamus. This seems to invoke equitable estoppel, not promissory estoppel. Further, whether a decision is final for mandamus purposes is a legal issue, not a factual representation or concealment on which estoppel can operate. (See 13 Witkin, Sum. of Cal. Law, *supra*, Equity, § 213; *Henry v. Los Angeles* (1962) 201 Cal.App.2d 299, 308.)

## II

### *Whether a Cause of Action is Stated*

KVB effectively seeks review of the County's decision to recirculate the EIR. To prevail at a civil trial, KVB would have to convince a trier of fact that the County *incorrectly* ordered recirculation of the EIR with the new parameters.

At present, KVB's suit is barred. Because the recirculation resolution has not been set aside, it stands as a presumptively valid exercise of the County's discretion. KVB's failure to have it set aside via mandamus bars its suit under the judicial exhaustion doctrine. By statute the sole method to seek review of a CEQA decision is via mandamus. A jury or judge (in the case of a civil court trial) cannot review the propriety of a lead agency's CEQA decisions. We agree with the trial court and the County that before KVB can bring a civil suit based on the allegedly improper adoption of the recirculation resolution, it must first have that resolution set aside via mandamus.<sup>5</sup>

In *Knickerbocker v. City of Stockton* (1988) 199 Cal.App.3d 235, a disciplined employee sued a city on contract and tort theories. He had partly succeeded at an administrative hearing by obtaining a ruling reducing termination to a demotion. We held that the administrative decision collaterally estopped him from alleging *no* grounds for discipline had existed; in other words, Knickerbocker failed to establish (via mandamus) that discipline was entirely unwarranted. Accordingly, we held he was limited to pleading civil claims based on his termination, the only issue regarding which he had shown (via mandamus) impropriety. (See *id.* at pp. 240-245.) We generally pointed out that: "Unless the administrative decision is challenged, it binds the parties on

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<sup>5</sup> We need not take a position here on whether KVB can *ever* obtain damages for such an alleged CEQA violation. (But see, *inter alia*, *Lake Almanor Associates L.P. v. Huffman-Broadway Group, Inc.* (2009) 178 Cal.App.4th 1194, 1203 ["CEQA includes no cause of action for damages resulting from violation of its provisions"].)

the issues litigated and if those issues are fatal to a civil suit, the plaintiff cannot state a viable cause of action.” (*Id.* at p. 243.)

In this case, the Board’s CEQA resolution established that it was appropriate to recirculate the EIR with different parameters. Administrative findings are presumed to be correct and a challenger has the burden to demonstrate otherwise. (See *Town of Atherton v. California High-Speed Rail Authority* (2014) 228 Cal.App.4th 314, 353 [“the City’s infeasibility findings are entitled to great deference and are presumed correct. . . . ‘The parties seeking mandamus bear the burden of proving otherwise’ ”].) The finding that the EIR needed to be recirculated presently stands unchallenged.

KVB contends the recirculation resolution was not “final” and thus could not be attacked via mandamus. We disagree. Although the Board did not “finally” resolve all CEQA issues pertaining to the project, it resolved the matter before it at the hearing--the adequacy of the EIR--by determining recirculation was appropriate. The recirculation resolution was not a proposed or tentative decision and was not subject to further *administrative* review. (Cf. 1 Cal. Admin. Mandamus (Cont.Ed.Bar 3d ed. 2018) Laying the Foundation at the Administrative Hearing, § 3.20 [decisions are final when rendered unless they are subject to rehearing, reconsideration, or modification]; Cal. Admin. Hearing Practice (Cont.Ed.Bar 2017) Decision and Review, § 8.103 [similar].) Once the resolution was adopted, KVB either had to accept it and pay for the EIR to be recirculated with new parameters or else abandon its project. The resolution thus had an immediate and concrete impact. (See *Tejon Real Estate, LLC v. City of Los Angeles* (2014) 223 Cal.App.4th 149, 156 [“ ‘ “a direct and immediate impact” ’ ”]; *Action Apartment Assn. v. Santa Monica Rent Control Bd.* (2001) 94 Cal.App.4th 587, 610 [“ ‘the finality requirement is concerned with whether the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury’ ”].)

In claiming the Board’s actions did not reflect decisions that could be challenged via mandamus, KVB overstates the holding in *Schellinger Brothers v. City of Sebastapol*,

*supra*, 179 Cal.App.4th 1245, as the trial court in this case explained. Based on a long delay in certifying an EIR, a project proponent sued for damages and to compel a lead agency to certify an EIR. (*Id.* at pp. 1253-1255.) *Schellinger* held no so-called “deemed approved” statutes provided for such relief (*id.* at pp. 1259-1260), and that the sought-after certification order would interfere with the lead agency’s discretion (*id.* at pp. 1265-1266).<sup>6</sup>

We agree with *Schellinger* that a trial court cannot order a lead agency to exercise its discretion in any particular way. (See § 21168.9, subd. (c).) But that does not mean the recirculation resolution was not final enough to challenge by mandamus. By statute, “If a court finds . . . that *any* determination, finding, or decision of a public agency has been made without compliance with this division, the court shall enter an order that includes one or more of the following: [¶] (1) A mandate that the determination, finding, or decision be voided by the public agency, in whole or in part. [¶] (2) . . . [¶] (3) A mandate that the public agency take specific action as may be necessary to bring the determination, finding, or decision into compliance with this division.” (*Id.*, subd. (a), italics added.) The use in the statute of the word “any” equates to “all” or “every.” (See *Siskiyou County Farm Bureau v. Department of Fish & Wildlife* (2015) 237 Cal.App.4th 411, 430.) The resolution was a “determination, finding or decision” under CEQA. (See *Environmental Protection Information Center v. California Dept. of Forestry & Fire Protection* (2008) 44 Cal.4th 459, 516 [“Administrative agency decisions in which discretion is exercised may generally be challenged” by administrative mandamus].)

Contrary to KVB’s view, *California Water Impact Network v. Newhall County Water Dist.* (2008) 161 Cal.App.4th 1464 (*Newhall*) does not hold to the contrary. In

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<sup>6</sup> We note that KVB cites part of *Schellinger* that quotes the trial court’s ruling in that case, a ruling lacking precedential force. *Schellinger* did not hold that review of a decision to recirculate an EIR was unavailable.

*Newhall*, a party tried to challenge a water supply assessment (WSA) conducted as part of the EIR process. By statute a WSA is required for certain projects to ensure that water needs and supplies are properly analyzed during environmental review, and when a WSA is required for a project it must be included in the EIR. (See *id.* at pp. 1478-1481; Wat. Code, § 10911, subd. (b).) The court held that a WSA was not a final determination subject to mandamus review; the proper method to challenge the adequacy of a WSA is by attacking the certification of the EIR. (*Newhall*, at pp. 1485-1488.) This holding seems justified, because the lead agency retains discretion to reject the EIR’s findings or order reconsideration until the EIR is certified.

KVB focuses on language in *Newhall* stating “there is no indication that the Legislature intended to create an additional layer of judicial review or to provide an additional avenue for judicial intervention *in the middle of the EIR process* at the behest of any party other than the lead agency. . . . The WSA is but an interlocutory and preliminary step in the EIR process and in general, interim determinations are not subject to mandamus review. [Citation.]” (*Newhall, supra*, 161 Cal.App.4th at p. 1486, italics added.) We agree with *Newhall* that a party cannot attack one component of an *uncertified* or draft EIR but instead must lodge administrative objections and if they are not satisfactorily addressed then attack the EIR after it has been certified. We do not see how that means KVB could not have attacked the recertification resolution in this case.<sup>7</sup>

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<sup>7</sup> Nor does *Mammoth Lakes, supra*, 191 Cal.App.4th 435, support KVB’s premature breach of contract claim, despite KVB’s view to the contrary. The breach there was a town’s refusal to move forward with a project based on a factor within the town’s control. The town wanted federal funding not available unless the project were changed; by seeking such funding the town created its own obstacle to the project. (*Id.* at pp. 441, 456, 458-459, 466, 467.) We held that the contract breach was the unilateral creation of a new project condition, not an issue appropriate for mandamus. (*Id.* at pp. 453-457.) In contrast to *Mammoth*, here the County did not refuse to move the project forward, it merely ordered additional CEQA review. This moved the project forward, just not in the direction KVB preferred.

KVB also contends that even if the resolution were final, it was not the kind of administrative decision that would collaterally estop it in the future, and the elements of collateral estoppel have not been met, therefore judicial exhaustion does not bar this civil suit. We disagree.

As for the latter point, after listing five elements of collateral estoppel, KVB asserts that “the first 4 of the 5” requirements were not met. But in support of this claim, KVB merely states the County took no final action (a legal conclusion), acted for improper reasons, and did not issue adequate findings. This does not satisfy KVB’s duty, as the appellant, to coherently explain the point on which its claim rests. (See *In re S.C.* (2006) 138 Cal.App.4th 396, 408.)

As for the former point, KVB is correct that in the ordinary (i.e., non-CEQA) administrative context “For an administrative decision to have collateral estoppel effect, it and its prior proceedings must possess a judicial character. [Citation.] Indicia of proceedings undertaken in a judicial capacity include a hearing before an impartial decisionmaker; testimony given under oath or affirmation; a party’s ability to subpoena, call, examine, and cross-examine witnesses, to introduce documentary evidence, and to make oral and written argument; the taking of a record of the proceeding; and a written statement of reasons for the decision. [Citation.]” (*Pacific Lumber Co. v. State Water Resources Control Bd.* (2006) 37 Cal.4th 921, 944.) But we do not read this quote, from a non-CEQA case, to mean that judicial exhaustion *cannot apply unless* each of the enumerated “indicia” of a judicial proceeding is present. The hearing in question was noticed and open to the public, detailed minutes were kept, members of the public and KVB had the opportunity to comment on the EIR and did so, the Board deliberated and reached decisions on the contested views about the EIR, and the minutes describe the

new parameters for recirculating the EIR.<sup>8</sup> We must presume that the Board acted lawfully and in good faith, as an impartial decisionmaker. (See, e.g., *City of Grass Valley v. Cohen* (2017) 17 Cal.App.5th 567, 582, fn. 9; *Bus Riders Union v. Los Angeles County Metropolitan Transportation Agency* (2009) 179 Cal.App.4th 101, 108.) It is true that commentators at a CEQA hearing are neither sworn nor subject to cross-examination. But they still tender “evidence” in the broad sense. (See, e.g., *Bowman v. City of Berkeley* (2004) 122 Cal.App.4th 572, 583 [under CEQA fair argument standard, “Statements of area residents . . . may qualify as substantial evidence”].) Requiring an oath and cross-examination would depart from longstanding practice; imposing such requirements--apart from discouraging the public input central to CEQA (see *Georgetown Preservation Society v. County of El Dorado* (2018) 30 Cal.App.5th 358, 379)--would breach a statute barring courts from creating new CEQA requirements. (See § 21083.1 [courts should not interpret CEQA “in a manner which imposes procedural or substantive requirements beyond those explicitly stated in this division or in” CEQA regulations].)

We are not persuaded that the differences between a true judicial proceeding and a discretionary CEQA hearing mean the judicial exhaustion requirement cannot be applied: This was a quasi-judicial CEQA hearing. (See *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 566-567; § 21168 [“a proceeding in which by law a hearing is required to be given, evidence is required to be taken and discretion in the determination of facts is vested in a public agency”].) It had sufficient indicia of a judicial proceeding to support the judicial exhaustion doctrine.

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<sup>8</sup> KVB suggests that the minutes lack adequate findings and therefore the Board’s decision cannot be attacked in mandamus. But as the County points out, an administrative decision can be attacked in mandamus based on the lack of legally required findings. (See, e.g., *Mira Mar Mobile Community v. City of Oceanside* (2004) 119 Cal.App.4th 477, 496.)

Further, by statute there are generally only two ways to review a CEQA determination; administrative and traditional mandamus.

Under Public Resources Code section 21168:

“*Any action or proceeding to attack, review, set aside, void or annul a determination, finding, or decision of a public agency, made as a result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken and discretion in the determination of facts is vested in a public agency, on the grounds of noncompliance with the provisions of this division shall be in accordance with the provisions of Section 1094.5 of the Code of Civil Procedure.*”

“*In any such action, the court shall not exercise its independent judgment on the evidence but shall only determine whether the act or decision is supported by substantial evidence in the light of the whole record.*” (Italics added.)

Under Public Resources Code section 21168.5:

“*In any action or proceeding, other than an action or proceeding under Section 21168, to attack, review, set aside, void or annul a determination, finding, or decision of a public agency on the grounds of noncompliance with this division, the inquiry shall extend only to whether there was a prejudicial abuse of discretion. Abuse of discretion is established if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence.*” (Italics added.)

The word “any” in these two CEQA review statutes shows that those methods of mandamus review are exclusive, reflecting a legislative purpose to prevent second-guessing of the often politically charged CEQA decisions public agencies must make in the exercise of discretion. (See *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 576 [“The wisdom of approving this or any other development project, a delicate task which requires a balancing of interest, is necessarily left to the sound discretion of the local officials and their constituents”].) Deference to that discretion is achieved by limiting judicial review both by specifying the vehicles for review (administrative or traditional mandamus) and by limiting scope of such review (a court

determines as a legal matter whether (1) substantial evidence supports the agency's decision or (2) the agency proceeded as required by law).

In a closely analogous (albeit non-CEQA) case, a plaintiff alleged that the application of a zoning ordinance adopted pursuant to the subdivision map act (SMA) effected a taking of property and sued on a theory of inverse condemnation. A statute worded similarly to the CEQA review statutes provides that “[a]ny action . . . to attack, review, [or] set aside” a decision under the SMA had to be filed within 90 days of the decision. (Gov. Code, § 66499.37.) Our Supreme Court applied that statute of limitation even though the complaint (like KVB’s complaint herein) was framed as a civil action seeking damages. Our high court held that the plaintiff could have sought a variance from an adverse application of the ordinance and pursued an administrative appeal challenging the offending permit conditions, then sought review by mandamus if unsuccessful. The plaintiff could not bypass that procedure, which would have allowed the agency to avoid a taking, that is, to correct the offending action. (*Hensler v. City of Glendale* (1994) 8 Cal.4th 1, 25-26 (*Hensler*).) “A court cannot determine that compensation is due on allegations like those of plaintiff’s complaint without determining if the development restriction is a taking. It must, necessarily, rule on the validity of the ordinance, regulation, or administrative act under which development is restricted.” (*Id.* at p. 26.) The plaintiff could not “avoid these steps and compel the defendant to purchase the undeveloped portion of his property by electing to seek only compensation in an inverse condemnation action.” (*Id.* at p. 13.)

*Hensler* looked to the nature of the action, not the form of action or type of relief sought as characterized by the plaintiff. (See *Hensler, supra*, 8 Cal.4th at pp. 9, 22-23.) Similarly, KVB’s characterization of the action as one grounded in breach of contract entitling it to the remedy of damages cannot dictate our analysis. “The caption, title, or label of a pleading or other document does not determine its nature or legal effect. [Citations.] Rather, ‘it is what is contained in the [document] itself that is significant.’

[Citation.]” (*Stiger v. Flippin* (2011) 201 Cal.App.4th 646, 654; see *Ameron Internat. Corp. v. Insurance Co. of State of Pennsylvania* (2010) 50 Cal.4th 1370, 1386 [referencing “our policy of emphasizing substance over form in characterizing pleadings”].) *Hensler* supports our view that KVB’s breach of contract suit is premature. Allowing a jury or judge sitting in a civil suit to review discretionary CEQA decisions would frustrate the legislative purpose of limiting review to mandamus proceedings and improperly allow second-guessing of the discretionary decisions CEQA vests in lead agencies.

### III

#### *Leave to Amend*

KVB argues it now should be granted leave to amend. We agree in part. KVB has not tendered any facts that would make its current claims viable, but can allege a new legal theory, administrative mandamus, to try to set aside the resolution.

#### *A. The Law*

A party may propose amendments to a complaint on appeal even if such amendment was not proffered below, to show the trial court abused its discretion in not granting leave to amend. (See Code Civ. Proc., § 472c; *Connerly v. State of California* (2014) 229 Cal.App.4th 457 (*Connerly*) [granting leave on appeal to change the legal theory of the case].)<sup>9</sup> The appellant must show the viability of the proposed amendments. (See *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) A party should outline in its opening

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<sup>9</sup> “The statute dictates that we frame the issue as whether the trial court ‘abused its discretion’ in denying leave to amend. [Citation.] This is arguably misleading and unfair. The trial court ruled on the facts and law that were presented in the . . . complaint and moving papers on the demurrer[.] However, we have been presented with and review a different theory. Nothing in our opinion should be read to impugn the trial court, despite the fact that we must characterize this as a case of abuse of discretion by that court in denying leave to amend, as the statute frames it.” (*Connerly, supra*, 229 Cal.App.4th at p. 460, fn. 2.)

brief the additional allegations it would plead so that the reviewing court can determine whether they are material, that is, whether the hypothetical amended complaint would state a viable claim. (See, e.g., *Live Oak Publishing Co. v. Cohagan* (1991) 234 Cal.App.3d 1277, 1286 [brief outlined new allegations].)

The opening brief outlined proposed allegations, which we address *post*. But KVB also moved to augment the record with evidence purporting to prove certain new facts. The County opposed the motion and this court previously denied it by order with a notation that the proffered evidence will be disregarded. We reaffirm that order.

## *B. Proposed Amendments*

### *1. Proposed New Facts*

The proposed new factual allegations in KVB's opening brief are as follows:

“(a) the March 29, 2016 Board actions were not a final determination concerning the EIR;

“(b) the Board failed to identify any CEQA deficiencies in the EIR;

“(c) the Board rendered no findings supporting the reasons for its actions that would allow them to be challenged by judicial review under CEQA;

“(d) the decisions of the Board on March 29, 2016 were made without compliance with CEQA and therefore the court should issue a writ of mandate ordering the County either to void those decisions or take the action necessary to bring the decision into compliance [citation];

“(e) the Board's refusal to give a thumbs up/down to the EIR as recommended by the Planning Department and as requested by KVB in the Post March 29 Correspondence was a malicious and arbitrary refusal to perform a directory duty [citation];

“(f) that the County by such inaction is estopped from claiming the actions were either final or that it rendered findings that are capable of judicial review under C.C.P. 1094.5; and,

“(g) based on the actions of the parties, the County was a joint venturer with KVB.”<sup>10</sup> (Footnote omitted.)

Most of these allegations are legal conclusions rather than factual allegations. None of the newly proffered facts avoid the conclusion that KVB must seek review § 21168) of the recirculation resolution via mandamus, if at all.

## 2. *Proposed New Mandamus Theory*

KVB also contends it can amend to proceed on a mandamus theory, seeking the very review KVB should have sought in the first place. We agree that KVB may amend the complaint to add a mandamus claim, as well as comply with the procedural requirements unique to a CEQA petition.

Apart from a fruitless quarrel with the established California rule that leave to amend may be sought for the first time on appeal from a judgment after a demurrer has been sustained, the County contends that KVB’s proposal to state a mandamus claim comes too late. On this record, we disagree.

As both parties agree, “An amended complaint relates back to the original complaint when it (1) is based on the same general set of facts as the original, (2) seeks relief for the same injuries, and (3) refers to the same incident. [Citation.]” (*Foxborough v. Van Atta* (1994) 26 Cal.App.4th 217, 230.) These requirements seem to be met because the same parties are involved and the same claim--the purported legally erroneous adoption of the recirculation resolution--would be at issue, a purported mistake that aggrieves KVB in both instances. While the sought-after *remedy* would differ, that would not render the general relation-back doctrine inapplicable. (See *Connerly, supra*, 229 Cal.App.4th at pp. 463, 464 [“a mere change in legal theory does not change the nature of the factual dispute”]; 5 Witkin, Cal. Procedure, *supra*, Pleading, § 1229 [change

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<sup>10</sup> The last allegation seems to conflict with a provision of the MOU stating the MOU “shall not operate to create the relationship of partnership, joint venture, or agency between” the County and KVB. But we need not resolve that point.

in remedy allowed]; *id.*, § 1235 [change in cause of action allowed if based “ ‘on the same general set of facts’ ”].)

The County does argue that the new mandamus claim would not relate back because of judicial exhaustion. It appears the County means that even if the mandamus claim were timely, that would not allow reviving the contract claim(s). But this is circular reasoning, and ineffectual. A pleading may combine damages claims with an administrative mandamus claim. (See *Hensler, supra*, 8 Cal.4th at p. 14 [“the inverse condemnation proceeding may be joined with the petition for writ of mandate” to challenge development restrictions]; *Sunset Drive Corp. v. City of Redlands* (1999) 73 Cal.App.4th 215, 218 [finding “combined petition for writ of mandate and complaint for damages for violation of . . . civil rights” stated claims for both mandate and damages].) The County has not provided any authority or argument suggesting this practice is infirm in general or would be unavailable to KVB based on the specific circumstances of this case.

As for the mandamus claim in and of itself, the County contends it is too late for KVB to amend to seek mandamus relief. Regardless of whether this may be correct, the County cannot establish that fact on appeal, because we are limited to considering only the alleged facts, matters judicially noticed, and proposed new allegations. This record does not show that any of the statutes of limitation relied on by the County have begun to run.

The Board adopted the recirculation resolution on March 29, 2016, and KVB filed its complaint (later corrected) on September 2, 2016. This was more than 90 days but less than 180 days after the Board’s action. CEQA generally provides for three periods of limitation, 30 days, 35 days, and 180 days, depending on the type of action taken and how it was taken. The two shorter limitations periods, if applicable, would bar KVB’s proposed mandamus action. But they apply to specified kinds of actions not including ordering recirculation of an EIR. (See § 21167, subds. (b)-(d).) And they measure the

time from the date a notice of determination (or notice of exemption) is filed. (See *id.*, §§ 21108 [state agencies], 21152 [local agencies].) A “catch-all” subdivision provides “An action or proceeding alleging that another act or omission of a public agency does not comply with this division shall be commenced within 30 days from the date of the filing of the notice [of determination].” (*Id.*, § 21167, subd. (e).) While this language is broad enough to encompass the recirculation resolution, it, too, hinges on filing of a notice of determination. (See *Committee for Green Foothills v. Santa Clara County Bd. of Supervisors* (2010) 48 Cal.4th 32, 43 [“The NOD plays a crucial role in determining the period during which CEQA challenges may be brought. Section 21167 establishes statutes of limitation for all actions and proceedings alleging violations of CEQA”]; *Kostka & Zischke, supra*, § 23.18 [“If any other claim of noncompliance with CEQA is alleged, the action must be filed within 30 days after a notice of determination is filed by the agency].)

Because the record does not show any notice of determination was ever filed, the County cannot show an amended complaint would be time-barred based on CEQA.<sup>11</sup>

The County alternatively relies on Code of Civil Procedure section 1094.6, which provides that a mandamus action “shall be filed no later than the 90th day following the date on which the decision becomes final.” (Code Civ. Proc., § 1094.6, subd. (b).) If applicable, this statute would bar KVB’s proposed mandamus claims. But as KVB points

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<sup>11</sup> The County explains how KVB misreads a regulation in seeking application of a 180-day CEQA statute of limitation because that regulation applies only to decisions to “carry out or approve” a project or to commence a project absent a lead agency decision. (Cal. Code Regs., tit. 14, § 15112, subd. (c) (5).) But this explanation still fails to show that any statute of limitation has run. “There is no requirement that a particular type of claim have a statute of limitation.” (*City of Oakland v. Public Employees’ Retirement System* (2002) 95 Cal.App.4th 29, 44.) The party asserting a statute of limitation (an affirmative defense), in this case the County, has the burden to establish it. (See *Ladd v. Warner Bros Entertainment, Inc.* (2010) 184 Cal.App.4th 1298, 1310.) Thus, KVB’s purported failure to identify an applicable statute of limitation is of no moment.

out, another part of that statute provides: “In making a final decision . . . the local agency shall provide notice to the party that the time within which judicial review must be sought is governed by this section.” (*Id.*, subd. (f).) Courts have held that absent the required notice, the 90-day period “is *tolled* until such time as the subdivision (f) notice is given.” (*El Dorado Palm Springs v. Rent Review Com.* (1991) 230 Cal.App.3d 335, 346 (*El Dorado*); see *Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 68 [observing that “this statute is not applicable here because the City apparently did not notify plaintiff of the statutory 90-day period”].) Again, because the record before this court does not show that the requisite notice was given, the County has not carried its burden to show that the general mandamus limitation period has expired.

On this record, we accept KVB’s view that its proposed amendment to allege a claim for administrative mandamus would be timely.<sup>12</sup>

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<sup>12</sup> We note that even if an agency *never* gave notice, “the doctrine of laches would still apply to the timeliness of a party’s effort to secure judicial review. [Citations.]” (*El Dorado, supra*, 230 Cal.App.3d at p. 346.) We also note that another case cited by the County in support of its claim that the mandamus statute of limitation lapsed does not discuss whether notice was given and thus does not advance the County’s contention. (See *Acad. of Our Lady of Peace v. City of San Diego* (S.D. Cal. 2011) 835 F.Supp.2d 895, 901-902.)

## DISPOSITION

The judgment is reversed with directions to the trial court to grant KVB, Inc., leave to amend to allege an administrative mandamus claim consistent with this opinion. The parties shall bear their own costs on appeal. (See Cal. Rules of Court, rule 8.278(a)(5).)

/s/  
Duarte, J.

We concur:

/s/  
Butz, Acting P. J.

/s/  
Hoch, J.